United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1016

To be argued by
THOMAS P. SMITH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1016

B/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

LUIS E. CHICO and GAIL A. COLELLO,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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Statement of the Case

This is an appeal from an order of the United States District Court for the District of Connecticut, T. Emmet Clarie, Chief Judge, denying appellants' motion to dismiss probation violation proceedings and to vacate their convictions pursuant to Title 28, United States Code, section 2255, and *United States* v. *Mauro*, 544 F.2d 588 (2d Cir. 1976). Those convictions, stemming from appellants having *pleaded guilty* to federal charges which were lodged while they were in state custody on unrelated matters, initially resulted in the imposition of a suspended sentence and a two year term of probation for each appellant. On December 6, 1976, the District Court

rejected appellants' motion for dismissal and vacation, found each to be a probation violator, and extended their terms of probation by one year. This appeal followed the Court's denial of a motion to reconsider its December 6th ruling.

Statutes Involved

Interstate Agreement on Detainers Act, 18 U.S.C. App. §2

Article I

"The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

Article II

"As used in this agreement:

"(a) 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

"(b) 'Sending State' shall mean a State in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof.

"(c) 'Receiving State' shall mean the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof.

* * * * *

Article IV

"(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: *Provided*, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: *And provided further*, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

* * * * *

"(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e), hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

* * * * *

Article V

"(a) * * * In the case of a Federal prisoner, the appropriate authority in the receiving State shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in Federal custody at the place of trial, whichever custodial arrangement may be approved by the custodian.

* * * * *

"(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending State.

* * * * *

"(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State. . . .

* * * * *

Article IX

"This agreement shall be liberally construed so as to effectuate its purposes."

Questions Presented

1. Does the Interstate Agreement on Detainers Act govern the production of state prisoners who are confined within the boundaries of the District in which indictments are pending and, if so, is it violated by permitting such prisoners to remain in state prisons during the course of federal proceedings against them?

2. Did the appellants waive any rights they otherwise might have had under the Interstate Agreement on Detainers by failing specifically to request that they be

lodged as federal detainees rather than be returned to the state prisons at which they had been confined for approximately eight months?

3. Did the appellants waive any rights they might otherwise have had under the Interstate Agreement on Detainers by pleading guilty?

4. Did the District Court abuse its discretion, or otherwise improperly deny section 2255 relief to the appellants, who never raised their claim in a timely motion to dismiss and who pleaded guilty.

5. Did the District Court abuse its discretion in finding that the appellants had violated the conditions of their probation?

Statement of the Facts

A Grand Jury in Hartford indicted Luis Chico and Gail Colello on October 10, 1972, charging them in four counts with bank larceny and misapplication of bank funds. Title 18, United States Code, sections 2113(b) and 656. At the time of their indictment each was in the custody of the State of Connecticut, having been incarcerated since April of 1972 as a result of unrelated state felony convictions.

Pursuant to writs of habeas corpus ad prosequendum, Chico and Colello were produced in District Court for arraignment on November 20, 1972. At the completion of proceedings on that day, Chico was returned to the Connecticut State Prison at Somers, and Colello was returned to the Connecticut Correctional Institution for Women at Niantic.

On December 4, 1972 appellant Colello entered a plea of guilty to Count Two of the indictment, admitting upon inquiry that she aided and abetted the theft of money orders from a federally-insured bank. Similarly, on February 27, 1973, appellant Chico pleaded guilty to Count Four of the indictment, also openly admitting his guilt of the offense charged. At the conclusion of these proceedings, and while awaiting disposition, both appellants were returned to the respective state institutions from which they had come.

Appellant Colello was sentenced on February 5, 1973 to two years' probation, commencing upon her release from state custody. Appellant Chico was sentenced on June 25, 1973 to two years' probation, to begin upon his release from state prison, with a special condition of probation being that he "make restitution of stolen funds." (Appellants' Appendix at 7).

On October 6, 1976 probation violation warrants were issued for both appellants, charging that they had failed to advise their probation officer of their change of residence, and had failed to report as directed between March 11, 1976 and September 30, 1976. Slightly more than a month after the issuance of these warrants, appellants surrendered themselves to the Federal Bureau of Investigation. On that same day, November 24, 1976, a preliminary hearing was held before a United States Magistrate. A probation violation hearing was scheduled for December 6, 1976 before the Honorable T. Emmet Clarie, at Hartford.

At that hearing the appellants orally moved to dismiss the probation violation proceedings and to vacate the underlying judgments of conviction. Relying on *United States* v. *Mauro*, 544 F.2d 588 (2d Cir. 1976),

appellants argued that their rights under the Interstate Agreement on Detainers had been violated by virtue of the fact that they had been returned to state custody after their arraignment. After entertaining oral argument, the District Court denied appellants' motion to vacate their convictions and dismiss the proceedings.

Appellants thereupon admitted having violated the terms of their probation by moving to New Jersey without notifying their probation officer and by failing to report as they had been directed. After entertaining several arguments in mitigation, the Court found appellants to be in violation of their probation and ordered that the probation of each be extended for an additional year. A special condition that each petitioner submit to random urinalyses was also imposed. Supervision of the appellants was transferred to the District of New Jersey. The District Court later denied a written motion to reconsider its ruling. This appeal followed.

I.

The interstate agreement on detainers neither governs the production of state prisoners who are confined within the boundaries of the district in which indictments are pending, nor is violated by permitting such prisoners to remain in state prisons during the course of Federal proceedings against them.

The District Court properly rejected appellant's request for an application of *United States* v. *Mauro*, 544 F.2d 588 (2d Cir. 1976), to the facts of the present case. In *Mauro* two state prisoners, both of whom were incarcerated in penitentiaries located outside the Eastern

District of New York,[1] were produced in federal court in that District pursuant to writs of habeas corpus ad prosequendum. These writs, which were designed and intended to operate outside the territorial limits of the United States District Court for the Eastern District of New York, commanded their presence in order to stand trial. *Mauro*, *supra*, 544 F.2d at 591, n. 4.

During the interval between their removal from the state institutions at which they were confined and their initial return to those prisons, the appellants in *Mauro* were incarcerated *as federal prisoners* at the Metropolitan Correctional Center, a federal house of detention located within the Southern District of New York. After allegedly languishing in that facility as federal prisoners between, at the very least November 19th and December 2, 1975, the *Mauro* appellants were returned to their respective state prisons. This, however, did not end their alleged shuttle *between the penal institutions of different jurisdictions*, for late in April of 1976 both prisoners were transferred back to the Eastern District, once again for the purpose of standing trial. *Id.* at 592.

None of these circumstances is present in the instant case. Unlike the appellants in *Mauro*, Luis Chico and

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[1] Appellant Mauro was confined at the Auburn Correctional Facility in Auburn, New York. Appellant Fusco was confined at the Clinton Correctional Facility at Dannemora, New York. *See, United States* v. *Mauro*, 544 F.2d 588, 590, n. 1. Neither of these facilities is located within the geographical or jurisdictional confines of the Eastern District of New York. Hence there were plainly two separate inter-jurisdictional transfers in that case. The first occurred when each appellant was brought *from outside* the Eastern District in order to stand trial. The second occurred almost a month later when each prisoner was *removed from* the Eastern District in order to return to the "sending state." Their original places of imprisonment were, in short, outside of the jurisdiction of the "receiving state." This is not so in the present case.

Gail Colello were incarcerated by the State of Connecticut at the time of their indictment, and never left either the State or the District of Connecticut during the entire course of the proceedings against them. Unlike the *Mauro* appellants, neither appellant in the present case was produced in federal court pursuant to an extra-territorially executed writ of habeas corpus. And unlike the appellants in *Mauro*, who were shuttled between the penal institutions of the State of New York and the federal government, neither appellant in the present case was ever confined in a federal institution during the interval between their removal from, and return to, the state penitentiaries at which they were confined.

There are no federal detention facilities in the District of Connecticut. Federal pre-trial detainees are customarily lodged in state jails pursuant to a contract between the State of Connecticut and the federal government. At the time of their arraignment in District Court, the appellants had already been incarcerated by the State of Connecticut for approximately eight months. The particular institutions at which the appellants were confined are located less than an hour's drive from the federal courthouse at Hartford. Since the appellants had been in state custody prior to their arraignment, they presumably had become settled in their respective places of confinement, adjusted to their institutional surroundings, and exposed to whatever treatment and rehabilitative programs were available to them. Despite the fact the appellants could have been temporarily transplanted to a state jail to await trial as a federal pre-trial detainee, neither expressed any desire to do so.

By permitting appellants Chico and Colello to return to their respective places of confinement after their brief appearance in District Court, the government respectfully submits that it violated neither the letter nor

the spirit of the Interstate Agreement on Detainers.[2] That act is "plainly designed to avoid the shuttling of prisoners back and forth between the penal institutions of the two jurisdictions." *Mauro, supra*, 554 F.2d at 593. While the Agreement may well, as *Mauro* indicates, be violated by permitting a federal detainee to leave *a penal institution* of the "receiving state" and return to the original place of his imprisonment untried, this did not occur in the present case. Here, in total compliance with the policy, if not the mandate of the Agreement,

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[2] The government does not, however, concede that the appellants were produced in federal court pursuant to the Interstate Agreement. Rather, the government maintains that appellants were produced pursuant to lawful writs of habeas corpus ad prosequendum which were issued to operate within the territorial jurisdiction of the United States District Court for the District of Connecticut. Unlike a mere "written request for temporary custody", which may be refused by the Governor of the "sending State . . . either upon his own motion or upon motion of the prisoner," *see* Article IV(a), the government submits that these writs were honored, not because of comity or the Interstate Agreement, but by virtue of the Supremacy Clause, U.S. Const. Art. V, cl. 2; *see, United States* v. *Mauro, supra*, 544 F.2d at 595-596, n. 1 (Mansfield, *J.* dissenting); *United States* v. *Ford*, — F.2d — (2d Cir. 1977), *slip op.* at 1696, n. 26. This contention is supported by the proposed Criminal Justice Reform Act of 1975 (S. 1), section 3201(a), which indicates that the United States is a party to the Agreement only as a "sending state" and the accompanying report of the Senate Committee on the Judiciary, which provides that the Agreement's enabling act

> "has been amended to clarify the intent of Congress by providing that the Federal Government is a participant in the Agreement only in the capacity of sending state. Federal prosecution authorities and all Federal defendants have always had and continue to have recourse to a speedy trial in a Federal court pursuant to 28 U.S.C. 2241(c)(5), the Federal writ of *habeas corpus ad prosequendum*. The Commitee does not intend, nor does it believe that the Congress in enacting the Agreement in 1970 intended, to limit the scope and applicability of that writ."

the government chose not to impede the appellants' treatment and rehabilitation by unnecessarily confining them as detainees in one of the other state institutions at which the government maintains prisoners on a contract basis. In short, since the appellants would have been lodged at a state facility in any event, common sense if nothing else dictates that they should have been returned, in the absence of a request to the contrary, to the state institution from which they came. To have done otherwise would have produced the precise disruption and uncertainty which Congress sought to eliminate. *Cf. United States* v. *Mauro*, *supra*; *United States* v. *Ford*, — F.2d — (2d Cir. 1977), *slip op.* at 1698 (February 3, 1977); *United States ex rel. Esola* v. *Groomes*, 520 F.2d 830, 836-837 (3d Cir. 1975).

Congress, it is respectfully submitted, never contemplated, and should not lightly be held to have intended, such an absurd result. *United States* v. *Kirby*, 74 U.S. (7 Wall.) 482, 486-487 (1869); *Church of the Holy Trinity* v. *United States*, 143 U.S. 457 (1892). Rather, this Court's interpretation of the Agreement should fairly reflect Congress' purpose which, according to *United States* v. *Mauro*, *supra*, was to eliminate the rehabilitative disruption and morale problems resulting from "the shuttling of prisoners back and forth between the penal institutions of . . . two jurisdictions." *Id.* at 593. In the absence of an intervening incarceration in a penal institution of the receiving state, the evil at which the Interstate Agreement is aimed simply does not exist, and the government respectfully urges this Court to limit *United States* v. *Mauro*, *supra*, by so holding.

Such a construction neither requires a "judicial amendment" of the Agreement, nor does violence to the language used in the statute. In fact, such an interpretation is completely consistent with the text of Article IV(e), the very provision upon which appellants base their claim for relief. That Article provides:

> "If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the *original place of imprisonment* pursuant to article V(e), hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." (Emphasis added).

By its terms the operation of Article IV(e) is restricted to instances in which a prisoner is returned untried to his "*original* place of imprisonment." The phrase "original place of imprisonment" subsumes the existence of at least one additional "place of imprisonment" at which a prisoner has been confined at some subsequent point in time. In the absence of a subsequent imprisonment in a penal institution of the "receiving state," the government respectfully maintains, there can be no "shuttling of prisoners back and forth between the penal institutions of . . . two jurisdictions," *Mauro*, *supra*, 544 F.2d at 593, and there is no violation of either the letter or spirit of the Agreement.

II.

Appellants' failure specifically to request that they be lodged as pre-trial detainees at a different institution, rather than be returned to the same institutions from which they came, operated as a waiver of any rights they otherwise might have had under Article IV(e) of the Interstate Agreement on Detainers.

At the time they were initially produced in District Court pursuant to writs of habeas corpus ad prosequendum, Luis Chico and Gail Colello had been incarcerated by the State of Connecticut for approximately eight

months. Chico enjoyed the status of a full-fledged inmate at the Connecticut Correctional Institution at Somers. Colello, a woman, was a sentenced state prisoner at the Connecticut Correctional Institution for Women, at Niantic. At their arraignments neither appellant expressed any desire whatsoever to be transplanted temporarily to a different institution in order to await trial as a pre-trial detainee.

Appellants' failure to express any desire to be lodged at a different institution was both rational and understandable. Each was incarcerated in a state prison, as opposed to a jail, and neither was located more than an hour's drive from the federal courthouse in Hartford. Both were presumably earning "good time" at their respective institutions and, since they had already been incarcerated for approximately eight months, each had presumably received job assignments and had begun to participate in rehabilitation programs. Each had also presumably established friendships at their respective institutions and had become accustomed to their surroundings. Each, in short, was undoubtedly aware that a temporary relocation to another institution in order to await federal trial would have been unnecessarily disruptive of their institutional progress and privileges, and unquestionably would have resulted in their confinement at one of the relatively spartan state *jails* in which the federal government *automatically* lodges federal pretrial detainers pursuant to a contract between it and the State of Connecticut.[3]

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[3] There are no federal pre-trial detention centers in the District of Connecticut. Pre-trial detainees are housed as a matter of course at state jails. Detainees awaiting federal trial at Hartford are almost invariably lodged at the Connecticut Correctional Institution at Hartford, more commonly known as the "Seyms Street Jail." The cost of maintaining such detainees is paid by the federal government.

[Footnote continued on following page]

The failure of Luis Chico and Gail Colello to express any desire to be lodged in different institutions while awaiting trial should be viewed, under the foregoing circumstances, as an intelligent and effective expression of consent to be returned to their original places of imprisonment. This expression, it is submitted, operated as a waiver of their rights under the "single rendition" provision of Article IV(e) of the Interstate Agreement on Detainers. *United States* v. *Ford*, — F.2d — (2d Cir. 1977), *slip op.* at 1698, n.29 (February 3, 1977) (Mansfield, *J.*). Also see *United States* v. *Cyphers (Ferro)*, — F.2d — (2d Cir. 1977), *slip op.* at 1750-1752 (February 8, 1977) (Timbers, *J.* dissenting).

Since the right allegedly conferred upon the appellants by Article IV(e) is neither a constitutional right nor even remotely related to the fairness of any proceeding against them, the government respectfully submits that the proper standard to be employed in determining whether there was an effective waiver is not the standard of *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), alluded to in *Mauro*, *supra*, 544 F.2d at 591 , n. 3, but that of *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 235-246 (1973).

Female federal detainees are almost invariably held at the Connecticut Correctional Institution for Women at Niantic, which is where the defendant Gail Colello was *already* incarcerated at the time of her initial appearance in District Court. The government similarly reimburses the State of Connecticut for its housing of female federal detainees.

Had Chico requested that he not be returned to the Connecticut Correctional Institution at Somers, he would have been detained at some other Connecticut correctional institution. Had Colello requested that she not be returned, she too would have been housed in a state facility, for there are no federal women's prisoners in the District of Connecticut.

III.

The appellants waived whatever rights they otherwise might have had under Article IV(e) of the Interstate Agreement on Detainers by pleading guilty.

The government respectfully submits that the appellants waived whatever rights they otherwise might have had under the Interstate Agreement by pleading guilty. It is well-settled that a plea of guilty constitutes a waiver of all non-jurisdictional defects in a criminal proceeding. *See generally Weisser* v. *Ciccone*, 532 F.2d 101, 104 (8th Cir. 1976); *Traber* v. *United States*, 466 F.2d 483 (5th Cir.) (Per Curiam), *cert. denied*, 409 U.S. 1044 (1972); *Rice* v. *Beto*, 420 F.2d 863, 865 (5th Cir. 1969), *cert. denied*, 398 U.S. 910 (1970); *United States* v. *Donohoe*, 458 F.2d 237, 239, n. 3 (10th Cir.), *cert. denied*, 409 U.S. 865 (1972); *LaFever* v. *United States*, 257 F.2d 271, 272 (7th Cir. 1958); *Simmons* v. *United States*, 354 F. Supp. 1383, 1388-1389 (N.D.N.Y. 1973). It is equally well-settled that jurisdictional defects, that is, defects in the Court's subject-matter jurisdiction, 8 Moore's Federal Practice ¶ 11.02[2][a] (Cipes ed.), cannot be waived.

In *United States* v. *Ford*, *supra*, this Court considered whether a claimed right to a dismissal of an indictment on the basis of an alleged return to state custody in violation of Article IV(e) was waivable. In holding that the claim was waived Judge Mansfield explained

> "This provision, however, which is intended to avoid the disruptions in a prisoner's rehabilitation occasioned by repeated transfers between jurisdictions, is thus for his benefit and is waivable." *Slip op.* at 1698.

Had the defect alleged in *Ford* been "jurisdictional in the broad sense of the court's power to adjudicate." *United States* v. *Travers*, 514 F.2d 1171 (2d Cir. 1974), it could not have been waived, and there would have been no need for the court to go on to consider the additional claims made under Article IV(c) of the Agreement. *Ford*, therefore, indicates that an Article IV(e) claim is not a jurisdictional one.

Since appellants' claim is non-jurisdictional, it falls squarely within that category of claims which are waived by a plea of guilty. *Cf. United States* v. *Cyphers* (*Ferro*), *slip op.* at 1750-1751 (Timbers, J. dissenting). The two cases relied upon by the appellants in support of their argument to the contrary, *Menna* v. *New York*, 423 U.S. 61 (1975) and *Blackledge* v. *Perry*, 417 U.S. 21 (1974), are inapposite. Those cases, it is submitted, dealt with a non-waivable, constitutional right designed to prevent the manifest prejudice which results from being prosecuted twice for the same offense. The present case concerns a statutory right, which is not designed to prevent prejudice resulting from the initiation of criminal proceedings, and which this Court has already indicated *is* waivable. *United States* v. *Ford*, *supra*.

IV.

The District Court properly denied section 2255 relief to the appellants who failed to raise their claim in the trial court prior to pleading guilty.

Although recent decisions of this Court indicate that an indictment is subject to dismissal in the event a violation of the Interstate Agreement on Detainers is raised prior to trial, *United States* v. *Mauro*, *supra*, and even, under certain circumstances, if first raised on appeal,

United States v. *Cyphers* (*Ferro*), *supra*, nothing in those decisions requires that relief be accorded under Title 28, United States Code, section 2255.

Under *Davis* v. *United States*, 417 U.S. 333 (1974), the proper inquiry which must be made in considering claims for section 2255 relief is whether the asserted error represents " 'a fundamental defect which inherently results in a complete miscarriage of justice' and whether '[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.' " *Id.* at 346, (quoting from *Hill* v. *United States*, 368 U.S. 424, 428 (1962)). The government respectfully submits that the appellant's claim for relief fails in every respect to meet the *Davis* test.

The actual holding in *Davis* was that collateral relief from a federal conviction is available on the basis of "an intervening change in substantive law," *Id.* at 334, and that when, as a result of that change, the petitioner's "conviction and punishment are for an act that the law does not make criminal," *Id.* at 346, the required "miscarriage of justice" and "exceptional circumstances" have been established. Similarly, the principal cases in this Circuit applying the *Davis* rule each involved relief from a conviction obtained without proof of what had subsequently been determined to be an essential element of the offense. *United States* v. *Loschiavo*, 531 F.2d 659 (2d Cir. 1976) (bribery of person later determined not to be a federal official); *United States* v. *Travers*, 514 F.2d 1171 (2d Cir. 1974) (fraudulent credit card scheme not sufficiently related to use of mails to support mail fraud conviction).

The situation of appellants Luis Chico and Gail Colello stands in sharp contrast to that of Davis, Loschiano, and Travers. They pleaded guilty. There has been no

intervening change in the applicable substantive law. The Interstate Agreement on Detainers remains today as it was in 1972. Appellants' present claim for relief could have been made at the moment they were first returned to their respective state prisons over four years ago. Furthermore, the decisional law upon which the appellants rely has no connection whatsoever with the substantive crimes of which they were convicted. Misapplication of bank funds is still a federal crime.

Appellants' contention that their claim is "jurisdictional," and thus can be raised without regard to the stage of the proceedings or their previous failure to assert it would have merit only if the claim were based "on a lack of jurisdiction, in the broad sense of the court's power to adjudicate the issues," *Loschiavo*, *supra*, 531 F.2d at 662-663, since the claim would presumably then be one which is never waivable, and one which the Court would be required to recognize at any time. Unfortunately for appellants, however, this very claim to an Article IV(e) dismissal on the basis of a return to state custody has expressely been held to be waivable by this Court in *United States* v. *Ford*, *supra*. As Judge Mansfield explained:

> "The provision, however, which is intended to avoid the disruptions in a prisoner's rehabilitation occasioned by repeated transfers between jurisdictions, is thus for his benefit and is waivable." *Slip op.* at 1698.

Had the defect alleged in *Ford* been truly "jurisdictional" in the broad sense of "power to adjudicate," that would have ended the matter, and there would have been no need for the Court to go on to consider the additional claims made under Article IV(c) of the Agreement.

Since appellants' claim is not "jurisdictional," and since it is based not on the constitution but on a statute, their attempt to raise it for the first time in a collateral proceeding must be viewed in the light of the additional restrictions imposed by *Sunal* v. *Large*, 332 U.S. 174 (1947). That case involved convictions under the Selective Service laws of defendants who had been held to be precluded by statute from challenging the basis for their classifications. Even though a subsequent Supreme Court decision had shown this statutory interpretation to be erroneous, Justice Douglas held that their failure to appeal their convictions was a bar to federal habeas corpus relief. Despite its later holding in Davis as to the standard for collateral review of both constitutional and non-constitutional claims, the Supreme Court left undisturbed *Sunal's* general requirement of prior resort to the appellate process, 417 U.S. at 345-346. As Judge Friendly recently observed in a case involving circumstances far more compelling than those of the present case:

> "We must take *Sunal* as meaning that when the error is one which can be rectified by proper construction of a criminal statute without resort to the Constitution . . . collateral relief will rarely be accorded to those who, even for apparently good reasons, did not exhaust the possibilities of direct review." *United States* v. *Travers*, *supra*, 514 F.2d at 1177.

Appellants' position is, of course, further weakened by their failure even to make their claim in the first instance to the trial court by way of a timely motion to dismiss.

Finally, the government respectfully submits that there is an irreducible element of discretion inherent in the District Court's habeas corpus power. This discretion necessarily underlies any application of the *Davis*

standard and its reference to a "fundamental defect," a "complete miscarriage of justice," and "exceptional circumstances." In view of the appellants' failure ever to raise their claim prior to their guilty plea, their failure ever to request incarceration as federal prisoners in a state jail, and the fact that they are not incarcerated and never have been, the District Court plainly did not abuse its discretion in denying section 2255 relief.

V.

The District Court did not abuse its discretion in finding that the appellants had violated the terms of their probation.

On the merits, the appellants admitted a violation of the probationary requirement that they not change their place of residence without notifying their probation officer. This admission, coupled with their probation officer's uncontroverted allegation that they had also failed to report as directed, provided an ample factual basis for the Court's finding. *United States* v. *Markovich*, 348 F.2d 238, 240-241 (2d Cir. 1965).

CONCLUSION

On the basis of the foregoing, the District Court properly denied the appellant's motion to vacate and to dismiss the probation violation proceedings. Its ruling should therefore be sustained.

Respectfully submitted,

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 77-1016

U S A,
APPELLEE

v.

LUIS E. CHICO and GAIL A. COLELLO,
APPELLANTS.

AFFIDAVIT OF SERVICE BY MAIL

Patricia D. O'Hara, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 51 West 70th Street, New York, New York 10023

That on the 16th day of March, 1977, deponent served the within Brief upon Peter Goldberger, Esq., Assistant Federal Public Defender, 770 Chapel Street, New Haven, Connecticut 06510

Attorney(s) for the APPELLANTS in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Patricia D O'Hara

Sworn to before me,

This 16th day of March, 1977

Edward A Quimby

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1977